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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 128

WALTER F. TELLIER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (Pet. A1-A24, Vol. II, 158-182) [1] are not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. A25-A26, Vol. II, 184) was rendered May 6, 1958. A petition for rehearing and rehearing en banc was denied

[1] References to Vol. I are to the printed appendix filed in the court below by petitioner. References to Vol. II are to the printed appendix filed by the Government below, supplemented by the proceedings in the court below. References to the unprinted transcript are prefaced by "Tr.".

on May 28, 1958 (Pet. A26; Vol. II, pp. 195-197). The petition for a writ of certiorari was filed June 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conversation between attorney and client is privileged when the parties intend to convey the information to others.

2. Whether, in a mail fraud prosecution, authenticated corporation books and records are admissible against any participant who made representations concerning the financial status of the corporation.

STATUTE AND RULE INVOLVED

Rule 26 of the Federal Rules of Criminal Procedure is as follows:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Section 1732(a) of Title 28, U. S. Code, as amended, is as follows:

> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or

event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of very kind.

STATEMENT

Petitioner was charged in 36 counts (Vol. I, 644-686) with violations of the mail fraud statute, 18 U.S.C. 1341; violations of the fraud section of the Securities Act of 1933, 15 U.S.C. 77q(a); and of conspiring to violate the above statutes under 18 U.S.C. 371. Elton B. Jones and Albert J. Proctor were co-defendants and the fourth co-defendant was the Alaska Telephone Corporation (referred to by its initials A. T. C.). They were indicted for causing the sale of A. T. C. debentures by means of untrue statements or omissions of material facts (Vol. I, 644-686).

Petitioner, Walter F. Tellier, was charged as a securities broker who operated under the firm name of Tellier & Co. (Vol. I, 646). Proctor and Jones were indicted as directors of A. T. C., which was engaged in acquiring, building, and operating small telephone systems in Alaska (Vol. I, 645). The trial resulted in a

verdict of guilty against petitioner on all counts (Vol. I, 3). Proctor and Jones were also found guilty (Vol. I, 3).

The petitioner was sentenced to four and one-half years imprisonment and fined $500 on each count (Vol. I, 3). Jones and Proctor were given suspended sentences (Vol. I, 3).[2]

The petitioner and Proctor appealed. The conviction of Proctor was unanimously affirmed; the conviction of petitioner was affirmed with one judge dissenting (Pet. A1-A24; Vol. II, 158-182). Proctor has not joined in Tellier's petition.

The following facts are pertinent to the issues presented:

In April 1951, the petitioner telephoned Bernard D. Cahn to discuss an offering of securities (Vol. I, 11, 14; Tr. 81). Cahn had been an attorney with the Securities and Exchange Commission (Vol. I, 8-9), and was considered an expert in the securities field (Tr. 536).

When Cahn arrived, he met some officials and the attorney for A. T. C. (Vol. I, 15). They discussed a proposed issue of debentures, not to exceed $300,000 (Vol. I, 21). By limiting the amount of the issue, they qualified under S. E. C. regulation A and could dispense with an elaborate prospectus (Vol. I, 23), three years of audited statements (Tr. 385), and expensive printing (Tr. 384) amounting to about $25,000 in total costs (Tr.

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[2] The corporate defendant, A. T. C., which was under a trustee in bankruptcy at the time of trial, was ordered not to appear in this criminal cause by the bankruptcy court (Vol. I, 2). The trial court considered the verdict against Jones and Proctor as a verdict against A. T. C., and imposed a nominal fine of $50 against the corporation on Count I and suspended sentence as to the remaining counts (Vol. I, 4).

385). Cahn was given a financial report prepared by the controller of A. T. C. (Vol. I, 30). Cahn and the A. T. C. attorney prepared the legal documents (Vol. I, 32) and the offering circular which offered $299,500 of Series A debentures (Gov. Ex. 1, Vol. I, 47, 33, 35, 637). Tellier signed an underwriting agreement which only obligated him to use his best efforts (Govt. Ex. 2, Vol. I, 34, 33). Cahn suggested the desirability of having audited balance sheets, but was advised there were no funds (Vol. I, 46).

Jones was President of A. T. C. in September when the Series A debentures were sold (Vol. I, 37, 46). In November of 1951, Lybrand, Ross Brothers and Montgomery, an accounting firm, was retained by A. T. C. (Vol. I, 46). Cahn went to Seattle around February 1, 1952 and at the board meeting discussed the financial condition of A. T. C. with the accounting firm (Vol. I, 57, 67). He was told that A. T. C. would show a loss of about $40,000 as compared to the statement furnished for the Series A offering circular, which showed net earnings (Vol. I, 30, 70). Cahn suggested that all who received debentures should receive a report showing the difference (Vol. I, 72). Cahn also told the board that no more public bond financing would be possible unless there were earnings, and suggested common stock (Vol. I, 72-73, 78). At this meeting, Cahn was elected to serve temporarily as a director (Vol. I, 67). In April 1952, Cahn attended another board meeting in Juneau, Alaska, and on returning told Tellier that A. T. C. should finance by selling stock privately (Vol. I, 85, 87).

When the audit was completed, it reflected losses for the four years ending December 31, 1951 (Govt.

Ex. 7, Vol. I, 81, 82). On June 16, 1952, Cahn resigned from the board of directors of A.T.C. (Vol. I, 91). Unable to obtain private financing, A.T.C. became delinquent in paying withholding taxes on its employees' wages, in remitting excise taxes collected from subscribers (Tr. 3415-3418), and in forwarding long distance tolls to Alaska Communications System (Tr. 239).

On December 9, 1952, Jones wrote Tellier reciting the need for funds, and Cahn suggested that Jones and Proctor come to New York (Vol. I, 94, 95). Proctor came in February 1953 (Vol. I, 105). Cahn stated he did not think A.T.C. could finance publicly until it showed a profit (Vol. I, 106). Proctor said that he believed the fourth quarter of 1952 would show a profit or that at least the break-even point had been reached. With this, Cahn told Proctor to prepare the offering (Vol. I, 107-108). Cahn subsequently learned of a default in the prepayment of interest to the indenture trustee (Vol. I, 111), and Jones told him they were paying this (Vol. I, 103).

Jones sent the proposed offering circular for Series B (Vol. I, 118). Cahn informed Tellier that it lacked the information which Cahn thought necessary (Vol. I, 119), and at Tellier's suggestion Cahn went to Seattle to obtain the data (Vol. I, 123, 127).

On April 1, 1953, Series B was offered (Govt. Ex. 19, Vol. I, 132) consisting of $150,000, 6%, 10-year convertible debentures. This offering (Govt. Ex. 19, Vol. I, 638) was for expansion, new equipment, and for working capital needed to continue operations. A later audit revealed that only $82.41 went into plant

and equipment and $8,957 to working capital (Govt. Ex. 26, Tr. 974, 979-980).

In May 1953, Jones wrote Cahn including a report showing a loss for the first quarter of 1953 (Govt. Ex. 25; Vol. I, 161-164). Cahn discussed this loss with Tellier and wrote Jones (Govt. Ex. 26; Vol. I, 164-165) expressing his concern that, while the offering circular stated they had reached the break-even point, the report indicated a $6,600 loss. He suggested that a copy of the statement should be sent to debenture holders "for legal as well as practical business reasons" (Tr. 320-322).

In the summer of 1953, Cahn saw the annual audit, which reflected that A.T.C. had lost $98,000 in 1952 (Govt. Ex. 27; Vol. I, 168-169). This report also noted the government tax liens (Vol. II, 43) which had not been indicated in the offering circular (Govt. Ex. 19; Vol. I, 638). On December 7, 1953, Proctor wrote Tellier (Govt. Ex. 28; Vol. I, 176-178; Vol. II, 53-56) enclosing a financial statement and stated they needed a short "breathing spell". Tellier referred it to Cahn (Vol. I, 175). When Cahn received the letter, he telephoned Tellier (Vol. I, 179). Over objection of counsel, Cahn testified that he told Tellier not to go ahead with any public offering as it would involve him in great trouble. Cahn said he would send Tellier a letter which he could forward to Proctor and Jones setting forth "why you can't sell any more bonds" (Vol. I, 181-182).[3] Cahn sent Tellier such a letter, explaining that bonds should not issue until they had demonstrated earning power; that there were very

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[3] This testimony is discussed in more detail in the Argument (*infra*, pp. 9-11).

serious legal problems in selling any more debentures (Vol. I, 185-189).

Early in January 1954, Tellier stated that something had to be done (Vol. I, 189), and Cahn told him that he would not represent him in any further financing (Vol. I, 190). Tellier proceeded to issue Series C in the face amount of $270,000, dated April 1, 1954 (Govt. Ex. 47; Vol. I, 641) for the same purposes as the previous series. No mention was made of government liens, or deposits necessary for interest payments. Proctor testified that none of the proceeds went for working capital (Tr. 3768). In 1953 A. T. C. lost $66,-681.18 (Govt. Ex. 73; Vol. II, 1).

Series D was issued December 1, 1954 in the face amount of $158,000 for the same purposes (Govt. Ex. 57; Vol. I, 643). No mention was made of government liens nor the required interest deposit. In 1954 A. T. C. lost $83,229.84 (Govt. Ex. 73; Vol. II, 1), and in the first six months of 1955 A. T. C. lost $52,678.87 (Govt. Ex. 73; Vol. II, 1).

In the autumn of 1955, A. T. C. filed under Chapter XI of the Bankruptcy Act (Vol. I, 518-519).

ARGUMENT

Petitioner tenders for review two evidentiary issues —the first relating to the attorney-client privilege, the second relating to the admissibility of certain corporate books. No constitutional question is involved. The first issue as stated by petitioner is not presented by this case; the second is of no general importance. The case basically turns on its particular facts and was correctly decided by the courts below. No conflict exists. In the circumstances, there is no occasion for further review.

1. a. Cahn, Tellier's former attorney, was allowed to testify to communications with Tellier, without any objection as to privilege, until asked to relate a telephone conversation in December 1953. Tellier had received a letter from Proctor (Govt. Ex. 28; Vol. II, 53-56; Vol. I, 175, 176-179), which enclosed a financial statement. Proctor stated in part, "As you will note there has been little, if any, improvement over the previous period." He indicated that the company was currently operating in the black, but needed funds for interest and wanted a "breathing spell." Tellier sent Proctor's letter to Cahn, appending the following note (Vol. II, 53): "Berney—See if we can put out more Bonds. WFT." After Cahn testified that he had telephoned Tellier, defense counsel objected that the conversation involved a confidential communication (Vol. I, 179, 180).

A colloquy then took place out of the presence of the jury (Pet. A27-A35). Government counsel argued that the privilege had been waived in that petitioner on two occasions had given agents of the S. E. C. documents authorizing Cahn to make available to the S. E. C. all his files and records concerning transactions between petitioner and the Alaska Telephone Company and to answer any questions concerning any such transactions (Pet. A28-A29). Petitioner's counsel took the position that the waiver extended only to the S. E. C. and not to the criminal trial, and that the documents were obtained by duress (Pet. A29-A30). The trial court agreed that the waiver was restricted to the S. E. C. investigation (Pet. A30). However, the trial court overruled the objection, noting that the advice to which Cahn had already testified was of the same general

character as "that which is now sought to be adduced, and the fact that Mr. Cahn in his earlier advice did not use the extreme language that you anticipate that he will use in connection with this question, does not change the essential relationship of the parties" (Pet. A32). The judge stated that counsel could not (Pet. A30) "in one breath say I do not object to this testimony on the ground that it tends to violate the confidential privileges, but I am reserving for myself the right to make that assertion at some future time, and then permit testimony to go in which does not vary in its essence to that which is now sought to be adduced." The judge also stated (Pet. A31) "that the objection based upon the alleged violation of the confidential relation has not thus far been offered, not because it would not be appropriate, but because the evidence sought to be developed would not be harmful." When defense counsel argued that Cahn in prior conversations had merely given financial advice, the court pointed out that this advice had nothing to do with the possibility of selling but with "the purely legal aspects of the transaction" (Pet. A33).

Cahn then testified that he told Tellier that to go ahead with any public offering would "involve you in great trouble" (Vol. I, 181). Cahn stated that selling bonds to pay interest "will involve you in a Ponzi scheme" (Vol. I, 182), and he would write Tellier a letter to be sent to Proctor and Jones, which would "set forth my legal conclusions as to why you can't sell any more bonds * * *" (Vol. I, 182). Cahn then wrote the intended letter (Govt. Ex. 29; Vol. I, 185-189), stating: "* * * Under the circumstances, I think there are very

serious legal problems as well as practical financial problems involved in selling any more debentures." On the same date, Tellier wrote Jones (Govt. Ex. 161; Vol. I, 364, 365; Vol. II, 62) that "Bernie Cahn does not believe that it would be possible for you to get a filing through the S. E. C. at this time. * * *"

In upholding the admissibilty of this evidence, the majority below relied on the ground that, "under the circumstances presented in the record, it is clear that this advice was not understood by either Cahn or Tellier to be confidential" (Pet. A11). It pointed out that petitioner expected a letter to be prepared to be forwarded to Proctor and Jones; that the letter did recite the substance of what Cahn told petitioner—the falsity of statements in the offering circular and the conclusion that proposed issuance raised "very serious legal problems." The fact that this was more formal language than Cahn's oral characterization of the plan as a "Ponzi scheme" was found by the majority not to indicate that some portion of the conversation was confidential since "the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content" (Pet. A12).

b. It is evident from the foregoing that the question raised by petitioner is not presented by this case. Both courts below recognized the importance of the attorney-client privilege. The general principles are not in dispute. The privilege is one relating to private communications and does not extend to communications intended to be conveyed to third persons. *Wilcoxon* v. *United States,* 231 F. 2d 384 (C.A. 10), certiorari denied, 351

U.S. 943; *Himmelfarb* v. *United States,* 175 F. 2d 924, 939 (C.A. 9), certiorari denied, 338 U.S. 860; VIII Wigmore, *Evidence* (3d ed.), Section 2311. It is equally well established that the privilege is one which the client may waive, not only expressly, but by implication. *Hunt* v. *Blackburn,* 128 U.S. 464, 470; Wigmore, *supra,* Section 2327. Hence, the only issue as to the privilege which this case presents is whether these established principles were properly applied to the particular circumstances presented by this record. We submit that they were and that the admissibility of the testimony may be upheld on either or both of the grounds relied upon by the courts below.[4]

On the totality of the picture presented by this record, the Court of Appeals was correct in concluding that Cahn's telephone conversation with petitioner was not considered confidential, either by the attorney or the client. The majority does not hold, as petitioner claims (Pet. 21), that a conversation between attorney and client, otherwise privileged, necessarily ceases to be protected when the conversation results in a communication to others concerning the same generalized subject matter. The majority holds that, "under the circumstances presented in the record, it is clear that this advice was not understood by either Cahn or Tellier to be confidential" (Pet. A11). While the majority does not at this point detail the background

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[4] Indeed, we believe that the district judge was more favorable to petitioner than was required in ruling that the formal written waivers of the privilege given to S. E. C. investigators were limited to that investigation and did not extend to the trial growing out of that investigation. Since, however, the district judge's concurrence with defense counsel on this aspect of the case had the effect of precluding any investigation into the claim of duress, we do not rely upon these formal waivers.

which it had previously set forth, the conversation at issue cannot be divorced from that background. The effect of the fact that the conversation was to be embodied in a letter to Proctor must be considered in relation to the other evidence in this case admitted without objection. This evidence disclosed that, as Cahn and petitioner well knew, Cahn had, after the issue of Series A, told the board of directors that no more public bond financing would be possible unless there were earnings (Vol I, 72-73); that, in connection with Series B, petitioner had sent Cahn to obtain necessary data (Vol. I, 123, 127); that, after discovering the loss for 1953, Cahn had discussed the loss with petitioner and written Jones (Vol. I, 164-165).[5] Against this background, a telephone conversation, which arose from the fact that petitioner sent Cahn a letter from Proctor, and which was to result in a letter setting forth Cahn's objections to further debentures for communication to Jones and Proctor, was properly found by the court below not to be deemed confidential by either side. And also, in the light of that background, the statement in the letter that the issuance would raise "very serious legal problems" could have been understood by all parties only as stating that such issuance would be illegal. While the language may not have been as colorful as the phrase "Ponzi scheme", the warning to all parties concerned was intended to be equally clear.

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[5] The background facts which form the basis for the advice did not even come from the client, but from audit reports, board meetings, and conversations with others. In fact, the lawyer was not kept fully informed, but had to learn of the existence of the government liens and nondeposit of prepaid interest from outside sources, to which the privilege naturally does not apply. *Hickman* v. *Taylor*, 329 U.S. 495, 508.

Moreover, we think the District Court was also correct in its holding that petitioner had already so fully waived the privilege that he could not endeavor to withdraw the waiver at the point at which he deemed it damaging. As Professor Wigmore states, VIII Wigmore, *Evidence* (3d ed.), Section 2327:

> A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. * * *

Here, at the very opening of trial, petitioner's counsel said (Tr. 40-44):

> * * * Mr. Cahn was acting as Mr. Tellier's attorney in this whole matter * * *. Tellier turned the matter over to his lawyer, Mr. Cahn, to investigate for him and from that point on followed Cahn's advice during the issuance of the first two series of debentures, Series A and B. Series A being issued to the public in 1951 and Series B being sold in 1953, the evidence will show you that Cahn—not Mr. Tellier— but Cahn drew up these offering circulars or prospectuses which were sent to the persons who bought the debentures * * *.
>
> Now there is no question about it that it was the opinion of this lawyer, Cahn, that Mr. Tellier should do no more financing for them after Series B.

> However, you will see in the testimony here, that although that was Cahn's opinion, or he says it was, that there were a number of other lawyers involved in this picture besides Mr. Cahn. * * *

This statement itself effectively disposes of petitioner's argument (Pet. 22, n. 3) that each debenture series must be considered a separate retainer because Cahn was separately paid for each. It is evident, not only from this statement, but from the background testimony discussed above, that Cahn was petitioner's attorney throughout the transactions in issue up to the time that petitioner decided to disregard his advice. The evidence of prior dealings among the various parties to which we have referred in connection with the understanding that the telephone conversation was not to be confidential also supports the conclusion of the district judge that the advice which Mr. Cahn had already testified to without objection "was of the same general character as that which is now sought to be adduced, and the fact that Mr. Cahn in his earlier advice did not use the extreme language that you anticipate that he will use in connection with this question does not change the essential relationship of the parties" (Pet. A32).

2. a. Henry J. Casagrande was employed as an accountant by the New York State Department of Law in the Securities Bureau (Vol. I, 227-228). After obtaining permission from the trustee to see A. T. C. records, he went to the office and the bookkeeper made available to him the books from which he made photostatic copies (Vol. I, 229, 232). On the basis of the photostatic copies, he prepared schedules which were offered in evidence over objection by the defense (Vol.

I, 233-234). The Government also offered the photostatic copies as a foundation for the schedules (Govt. Ex. 71; Vol. I, 237), to which petitioner's counsel objected, since the books had not been identified as kept in the regular course of business in accord with 28 U. S. C. 1732(a) (Vol. I, 234).

The trial court ruled that the witness had testified that the exhibit purported to be the records and that sufficient foundation had been laid to receive them in evidence. It reserved to each defendant the right to move to strike any portion which was not as testified to (Vol. I, 236-237).

Mary Elizabeth Best was the accountant for A. T. C. (Vol. I, 470). She testified that a portion of Govt. Ex. 71 reflected the journal (Vol. I, 479). There was also identification by George Hall, who formerly was employed by A. T. C. as a C. P. A. (Tr. 2690-2693). No defendant denied their authenticity.

The court below found there was sufficient evidence of authenticity (Pet. A13, A14), even though there was insufficient evidence that they were kept in the ordinary course of business (Pet. A13). The court unanimously held they were admissible against Tellier under the rule of *United States* v. *Feinberg*, 140 F. 2d 592, 596 (C.A. 2), certiorari denied, 322 U.S. 726, which held that, if a defendant in a mail fraud case made representations concerning the financial condition of a corporation, the corporate books were competent evidence against him. (Pet. A13).

b. Petitioner does not challenge the rulings of the courts below that the documents were sufficiently authenticated as the documents of the corporation. He argues that, nevertheless, they were inadmissible under

28 U.S.C. 1732(a) because there was not sufficient evidence that they were kept in the regular course of business. As records of the corporation, however, the books were documents available to petitioner which he could have consulted before making representations with respect to the use to which the money from the bond issues would be put. As such, they were competent evidence, admissible for consideration by the jury, without regard to the truth of their contents. Hence they were properly deemed admissible, not under the business records rule, but generally as competent evidence. The business records rule was designed to permit the introduction of books as proof of the truth of their contents; it does not serve to preclude the admission of books that would be admissible on some other grounds. *Bruce* v. *McClure*, 220 F. 2d 330 (C.A. 5); *Taylor* v. *United States*, 96 F. 2d 16 (C.A. 5), certiorari denied, 305 U.S. 596; *Harrison* v. *Remington Paper Co.*, 140 Fed. 385 (C.A. 8), certiorari denied, 199 U.S. 607.

United States v. *Feinberg*, 140 F. 2d 592 (C.A. 2), certiorari denied, 322 U. S. 726, applied the above principles to one who was not directly connected with the corporation on the ground that he had vouchsafed for them by his participation in the submission of financial statements of the corporation. In this case, the evidence of petitioner's intimate relationship with the corporation even more clearly justifies the admissibility of the books. Petitioner apparently recognizes that Judge Hand's opinion in *Feinberg* is controlling here (Pet. 25-28), but argues that "*Feinberg* plainly misread the [Second Circuit] precedent on which it purported to rely" (Pet. 28) and hence was wrongly decided. *Feinberg*, we believe, is clearly correct, and in

any event review of the question is no more justified in this case than it was in *Feinberg* itself.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1958.

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